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Supreme Court, U.S.
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No. 00-888

IN THE

Supreme Court of the United States

THE SEVEN PROVINCES INSURANCE COMPANY N.V.,

Petitioner,

v.

COMMERCIAL UNION INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Supreme Court should exercise its discretion to address an issue not presented to nor made a part of the decision of the First Circuit Court of Appeals.

2. Whether the doctrine of "follow the settlements" is a principle of state law, and (a) if so, how the federal court expanded existing Massachusetts state, and (b) if not, how state law is at all impacted by the decision of the federal court.

3. Whether the United States Supreme Court should exercise its discretion to review findings of fact made by the District Court and affirmed by the Court of Appeals concerning the application of state law to the particular facts presented below.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Commercial Union Insurance Company, as Successor in Interest to Employers' Surplus Lines Insurance Company, is wholly owned by CGU Corporation of Delaware which is not publicly traded.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Reasons for Denying the Writ	1
I. Seven Provinces Has Not Set Forth Any Justification For The Exercise Of The Supreme Court's Judicial Discretion In Granting A Petition For Writ Of *Certiorari*.	2
II. The District Court And First Circuit Correctly Found That Petitioner Was Indebted To Respondent Under The Reinsurance Contract.	4
A. Petitioner failed to raise the allocation issue on appeal to the First Circuit, and therefore, may not raise it here.	4
B. Petitioner has no viable defense for its non-payment or its actions in refusing to make payment under the reinsurance certificate.	6

Contents

Page

C. Neither the District Court's nor the First Circuit's opinion impermissibly expands state law. 7

III. Both The District Court And The First Circuit Correctly Found That Seven Provinces Committed An Unfair And Deceptive Practice And Was, Accordingly, Liable Under M.G.L. Chapter 93a. 9

A. The District Court correctly interpreted and applied Massachusetts law in finding Seven Provinces in violation of M.G.L. Chapter 93A. 9

B. Seven Provinces' argument that the lower court misapplied reinsurance law concerning the "unfair or deceptive acts or practices" claim against Seven Provinces mischaracterizes both the issue and finding. 10

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress Inc., 398 U.S. 144, 90 S. Ct. 1598 (1970) 6

EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 106 S. Ct. 1678 (1986) 5

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938) 8

Matsushita Elec. Indus. Co. v. Epstien, 516 U.S. 367, 116 S. Ct. 873 (1996) 5

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952 (1998) 5

Statute:

M.G.L. Chapter 93A 3, 4, 7, 9, 11

Rule:

United States Supreme Court Rule 10 .....1, 2, 3

REASONS FOR DENYING THE WRIT

Petitioner, The Seven Provinces Insurance Company N.V. (hereinafter either "Petitioner" or "Seven Provinces"), has failed to advance, let alone support, any argument why this Court should grant its Petition for Writ of *Certiorari* (hereinafter, the "Petition"), either pursuant to Supreme Court Rule 10, or because there exists any other compelling reason for this court to exercise its discretion. The decision of the Court of Appeals for the First Circuit (hereinafter, the "First Circuit") is not in conflict with any decision of the United States Supreme Court, any state's highest court or any other circuit court of appeal. Nor has the Petitioner demonstrated that the First Circuit has "departed from the accepted and usual course of judicial proceedings."

Moreover, this matter is not properly before this Court since the primary issue raised by the Petitioner — its right and/or ability to challenge Respondent's allocation of settlement amounts paid to its insured in order to resolve an insurance coverage dispute — was not presented on appeal. The Petitioner's only other substantive argument is a request to revisit the District Court's findings of fact, as affirmed by the Court of Appeals. Only in very rare circumstances will the Supreme Court reweigh factual findings or review the misapplication of properly stated law.

This case presents no far-reaching ramifications, as the questions of fact and application of law to those facts concerning which the Petitioner seeks review, are particular to this case. Additionally, the balance of power between reinsurers and ceding companies is not upset. Rather, the First Circuit's decision restates existing industry practice (as recognized by multiple judicial decisions) which requires

insurance companies to make all their settlement decisions in a reasonable manner, and obliges reinsurers to reimburse a ceding company for risks covered by the reinsurance agreement so long as the ceding company's actions are reasonable and taken in good faith.

I. SEVEN PROVINCES HAS NOT SET FORTH ANY JUSTIFICATION FOR THE EXERCISE OF THE SUPREME COURT'S JUDICIAL DISCRETION IN GRANTING A PETITION FOR WRIT OF *CERTIORARI*.

Petitioner has not set forth any justification, pursuant to Supreme Court Rule 10, for this Court to exercise its judicial discretion in granting the Petition. Most importantly, Petitioner has pointed to no "compelling reasons" why this Court should use its limited resources in hearing this matter which, cut to the core, would have been a garden-variety breach of contract action but for the incredible lengths to which Petitioner was prepared to go in order to avoid its contractual obligations. The decision of the First Circuit was a proper statement of the law and correctly applied to the facts — indeed, compelled by the facts — and is not in conflict with any other law, rule or policy. The opinion of the First Circuit does not contradict any existing law, nor as Petitioner argues, does it tip the balance of power existing between reinsurers and ceding companies.

Petitioner has not pointed to any of the considerations listed in Supreme Court Rule 10 to show why the Supreme Court should grant *Certiorari* in this matter. The Petition is nothing more than a menagerie of boiler-plate, conclusory assertions which, when viewed in the light of evidentiary presentations, were soundly and justifiably rejected by the

courts below. The detailed findings of fact and conclusions of law would have been the same had they been made or affirmed in any decision rendered by any other circuit addressing the doctrine of follow the settlements. Specifically, Petitioner has not stated how the decision of the First Circuit is in conflict with either a decision of the United States Supreme Court, another Circuit Court of Appeals, or any state's highest court. Nor has Petitioner demonstrated how the First Circuit has "so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10. Finally, Petitioner has not stated any important question of Federal Law that needs to be settled by this Court, particularly where the underlying matter involves an insurance dispute, which is a uniquely state specific issue.

Apart from the considerations of Supreme Court Rule 10, none of Petitioner's arguments warrant review by this Court as they are not part of the decision below. Petitioner's primary argument before this Court, which concerns the doctrine of "follow the settlements," was not raised in the First Circuit, and accordingly, was not a part of its decision. Petitioner is therefore requesting this Court to review a decision concerning an issue to which Petitioner itself did not assign error. Petitioner's only other substantive argument, the finding of liability pursuant to M.G.L. Chapter 93A (hereinafter, "Chapter 93A"), is strictly a request to reweigh findings of fact which were made by the District Court, and affirmed by the First Circuit. These factual findings are, of course, unique to this case, with no far reaching implications. There is no reason either under Supreme Court Rule 10 or otherwise to grant the Petition.

II. THE DISTRICT COURT AND FIRST CIRCUIT CORRECTLY FOUND THAT PETITIONER WAS INDEBTED TO RESPONDENT UNDER THE REINSURANCE CONTRACT.

A. Petitioner failed to raise the allocation issue on appeal to the First Circuit, and therefore, may not raise it here.

Petitioner did not raise as an "issue presented" on appeal to the First Circuit that the District Court erred either in restricting Petitioner's right to challenge Petitioner's settlement allocation, or in failing to conclude that Respondent allocated settlement dollars among policies unreasonably or in the absence of good faith. Petitioner now asserts that because Petitioner has been obliged to honor Respondent's claim submission under the parties' reinsurance certificate, the First Circuit has somehow expanded the concept of follow the settlements to apply similarly to allocation of the settlement dollars. Indeed, nowhere in the Brief of Appellant does the Petitioner even mention its allocation issue.[1] The only issues raised and argued by Petitioner in the First Circuit were the Chapter 93A issue and various questions of fact related to whether Petitioner

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1. Even if the issue had been presented to the First Circuit, it would have been as exaggerated as it is being presented to this Court. The District Court went no further than conclude that a ceding insurance company's allocation of settlement dollars will be assessed by the same standards of reasonableness and good faith attendant to the settlement. Since the reinsurance industry universally accepts the proposition that the allocation must follow and be consistent with the settlement itself, the District Court's finding can hardly be characterized as anything new, let alone an unwarranted expansion of the law.

acted reasonably in delaying payment under the reinsurance certificate. It is only at the end of its Reply Brief that Petitioner even mentions the allocation issue on appeal to the First Circuit, and then only as a purported excuse for Petitioner's delay in paying Respondent pursuant to the reinsurance certificate. Significantly, Petitioner's Reply Brief expressly states that the allocation issue was not an essential issue at trial, nor on appeal, and even concedes that "Seven Provinces did not ask that the District Court alter Commercial Unions' allocation." (Reply Brief at pp. 21-22).

As a general rule, the Supreme Court of the United States will not address issues which were not raised in the Court of Appeals when reviewing decisions of that court. *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681 (1986) ("our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952 (1998); *Matsushita Elec. Indus. Co. v. Epstien*, 516 U.S. 367, 116 S. Ct. 873 (1996). On Petition for Writ of *Certiorari* the review of this Court is for error in the decision of the Court of Appeals, and the Supreme Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita*, 516 U.S. at 379, 116 S. Ct. at 880 (citations omitted).

Certainly there can be no compelling reason to grant *certiorari* and review a decision of the First Circuit concerning an issue which the First Circuit did not even consider due to Petitioner's failure to raise and argue the issue before the First Circuit. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. at 213, 118 S. Ct. 1956 ("where issues are neither raised before nor considered by

the Court of Appeals, this Court will not ordinarily consider them") (citing *Adickes v. S.H. Kress Inc.*, 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 1602, n.2 (1970). Petitioner may not now reargue the allocation issue. Having been deprived of the issue, one is at a loss to understand how the First Circuit can be said to have even considered the issue let alone having resolved it through an unwarranted expansion of the law and thereby creating a conflict among the circuit courts.

B. Petitioner has no viable defense for its non-payment or its actions in refusing to make payment under the reinsurance certificate.

The decision of the First Circuit does not focus on Respondent's allocation of settlement dollars to its insurance policies, as that issue was not presented to that Court by Petitioner. Instead, the First Circuit's holding centered on the ultimate conclusion that on the basis of the evidentiary record, the District Court had justification to conclude that Petitioner was obligated to make payment to Respondent, and that its decision to delay making such payment was predicated upon improper motivation.

The District Court and First Circuit both found that there was a valid and enforceable contract, with no valid exclusion or exception on which Seven Provinces could rely. Notably, the First Circuit did not hold, as Petitioner here argues, that the "follow the settlements" doctrine prohibits reinsurers from challenging any and all pre- and post-settlement decisions made by the ceding company. Rather, the District Court held that reinsurers must pay for losses which fall within the scope of a reinsurance agreement, and are bound by their ceding companies' reasonable and good faith settlement and allocation determinations. (Petition at 62a).

The First Circuit upheld the finding that a delay in such payment does constitute an unfair practice within the meaning of Chapter 93A. (Petition at 15a-16a).

C. Neither the District Court's nor the First Circuit's opinion impermissibly expands state law.

The doctrine of "follow the settlements" has never been limited to pre-settlement decisions. Respondent is unaware of any pre-existing authority in any federal or Massachusetts state court in which it has been held that "follow the settlements" does not apply to allocation of settlement dollars. Accordingly, Petitioner has been unable to cite to any authority to support its contention that the "follow the settlements" doctrine is inapplicable to allocation decisions. The distinction that Petitioner attempts to draw, i.e., that a ceding company's allocation decisions should be judged by standards other than those governing the ceding company's settlement decisions, is as arbitrary as it is unworkable, is inconsistent with accepted norms in the reinsurance industry, and in the words of District Court, is "a distinction without a difference". (Petition at 61a).

To the contrary, a holding that the "follow the settlements" doctrine is inapplicable to a ceding company's reasonable allocation determinations, as advocated by Petitioner herein, would constitute a departure from uniform precedent in both state and federal courts, thereby (a) creating a state of chaos in the prompt resolution of reinsurance claim submissions, and (b) carving out an exception to the "follow the settlement" doctrine. That doctrine requires reinsurers to pay ceding companies for amounts which ceding companies pay to their insureds under policies covered by the reinsurance contract, so long as the ceding companies' actions are reasonable and taken in good faith.

Petitioner's argument that the First Circuit should err in favor of finding no liability is misapplied in the instant matter. Rather, even if applicable, the Court should err in favor of upholding the century old doctrine of "follow the settlements" and preventing its further erosion. While the doctrine is imperfect, it nonetheless provides certainty and consistency in the handling of the business in an industry that is essentially self-policing. It is not for the courts to disturb in any way a custom and practice that was adopted by the participants in the industry and continues as the foundation that governs insurers' relationships *inter se*.

Petitioner's reliance on *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), is misplaced. The *Erie* decision stands only for the proposition that federal courts cannot, under the circumstances presented in *Erie*, substitute federal "general" law for conflicting state law. *Erie* does not stand for the proposition that a federal court must abstain from any decision in which a party, such as Petitioner, argues for an exception to a state rule or law. In any event, the doctrine of "follow the settlements" is not a principle of state law. It is a doctrine which evolves from custom, practice and usage in the industry and is simply "plugged into" specific factual scenarios by courts that have considered application of the doctrine. The District Court, as affirmed by the First Circuit, applied a century old doctrine which Petitioner did not challenge as inapplicable. Petitioner has not cited any Massachusetts authority in its attempt to demonstrate how the District Court or First Circuit has contradicted or misapplied such alleged authority.

The District Court held that it would judge a ceding company's settlement decisions, including its allocation determinations, under one standard. Applying that

standard, the District Court, as affirmed by the First Circuit, reviewed the reasonableness of Respondent's conduct, and specifically confirmed the reasonableness of the allocation. (Petition at 39a). Petitioner, was, therefore, obligated to make payment for its share of the insurance settlement.

III. BOTH THE DISTRICT COURT AND THE FIRST CIRCUIT CORRECTLY FOUND THAT SEVEN PROVINCES COMMITTED AN UNFAIR AND DECEPTIVE PRACTICE AND WAS, ACCORDINGLY, LIABLE UNDER M.G.L. CHAPTER 93A.

A. The District Court correctly interpreted and applied Massachusetts law in finding Seven Provinces in violation of M.G.L. Chapter 93A.

The imposition of liability for "unfair or deceptive acts or practices" concerning the instant matter, is strictly a state law issue which in Massachusetts, is governed by Chapter 93A. Chapter 93A provides for damages for an injured party who suffers loss from any unfair or deceptive act or practice in the conduct of trade or commerce, and such liability may be predicated upon conduct surrounding a breach of contract.

Both the District Court and First Circuit correctly found that the conduct surrounding Petitioner's four-year delay in paying Respondent constituted unfair or deceptive acts or practices which caused Respondent to suffer loss. The District Court found the entire history of Petitioner's conduct as being one of "evasiveness and obstructionism" (Petition at 52a). More specifically, the District Court found that Petitioner deliberately avoided coming to any conclusion as to what amount, if any, was owed to Respondent, in an attempt to

compromise the bill, by negotiating a settlement, arbitrating or mediating. The District Court found untenable Petitioner's tactics in relying on ever-shifting defenses, many of which the court found groundless. (Petition at 54a-56a). Ultimately, the District Court concluded that Petitioner "withheld performance due under the contract in order to renegotiate the bargain between the parties and force Commercial Union to do what it otherwise was not legally obligated to do, namely compromise a valid claim." (Petition at 64a).

B. Seven Provinces' argument that the lower court misapplied reinsurance law concerning the "unfair or deceptive acts or practices" claim against Seven Provinces mischaracterizes both the issue and finding.

The Petition does not address what laws were misapplied, other than argue that the "follow the settlements" doctrine should have applied. The District Court, as affirmed by the First Circuit, found that Seven Provinces engaged in an ongoing course of bad faith and unfair or deceptive practices in delaying the payment to Respondent under the reinsurance certificate for more than four years.

In arguing against the imposition of liability for "unfair or deceptive acts or practices", Petitioner makes precisely the same conclusory assertions which were rejected by the findings of fact made by the District Court. That Court was in a superior position to evaluate the facts and witnesses, and specifically found Seven Provinces' witnesses were not to be believed. When the credibility of a party's witnesses are expressly questioned by the finder of fact, it is hardly a stretch of logic to expect that the court would similarly find that said party was motivated by bad faith considerations in

its out of court business dealings. Petitioner is asking this Court to revisit the factual findings of the District Court which ultimately held that Petitioner's multi-faceted efforts and tactics over the course of its four-year delay constituted unfair or deceptive acts or practices.

Contrary to Petitioner's argument, it is not the denial of payment to the ceding company based upon a plausible defense which resulted in Petitioner's Chapter 93A liability, but rather, the totality of all the evidence concerning Petitioner's conduct which "bore the hallmarks of bad faith almost from the outset" that resulted in the District Court's finding of liability under Chapter 93A and the First Circuit's affirmation of that finding. (Petition at 66a). Nor was the special nature of the reinsurance relationship the basis for imposing bad faith liability upon Petitioner. The District Court had already found a violation of Chapter 93A when it made the observation that "Seven Provinces' behavior was particularly egregious when seen in the context of the mores of the reinsurance industry, an industry which has operated for centuries on the principle of 'utmost good faith' ". (Petition at 64a).

CONCLUSION

Petitioner has set forth no compelling reason why the United States Supreme Court should grant the Petition for Writ of *Certiorari* in the instant matter. Its request is based principally upon an argument which was not even advanced to the First Circuit, and therefore, could not have been a basis for that decision. Petitioner's only other contention, stripped to its essence, is that its witness should have been believed. The findings of fact of the District Court have already been reviewed and upheld by the First Circuit.

The resolution of the facts of this particular case will, of course, have no far reaching consequences. Each case will continue to be capable of adjudication, either in the traditional arbitration setting or in the courts, based upon its own unique facts and circumstances. Nor are there any other far reaching adverse implications resulting from the decision of the First Circuit. The business of reinsurance will function as efficiently as it has in the past with insurers and reinsurers of commercial integrity continuing to act in utmost good faith. Parties to reinsurance contracts will continue to be able to advocate coverage positions, and in the proper case, to resist questionable claim submissions where there is a basis to contend that the submission is unreasonable and not presented in good faith.

The decision of the First Circuit will not upset the traditional roles of reinsurers or ceding companies, but will continue to require ceding companies to make their settlement determinations in a reasonable manner, and will further continue to require reinsurers to honor covered claims submitted reasonably and in good faith under reinsurance contracts. Petitioner has actively lobbied for industry support for the propositions advanced in its Petition, but apparently without success. That alone speaks volumes to the merits of Petitioner's forecast of doom for the reinsurance industry.

The amount of time, expense and judicial resources wasted as a direct consequence of Petitioner's recalcitrance have been appropriately addressed by the imposition of well-deserved sanctions. It is time for these proceedings to conclude and for Respondent to be paid.

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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